

***United States Court of Appeals  
for the Second Circuit***



**PETITIONER'S  
BRIEF**



B  
P/S

**Docket No. 74-2516**

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**IN THE  
United States Court of Appeals  
For the Second Circuit**

OLIN CONSTRUCTION COMPANY, INCORPORATED,  
*Petitioner,*

—vs—

OCCUPATIONAL SAFETY AND HEALTH REVIEW  
COMMISSION and PETER J. BRENNAN, SEC-  
RETARY OF LABOR,

*Respondents.*

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**BRIEF FOR PETITIONER,  
Olin Construction Company, Incorporated**

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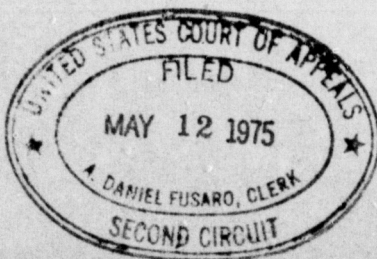




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OLIN CONSTRUCTION COMPANY, INCORPORATED,

Petitioner,

-vs-

C. A. No. 74-2516

OCCUPATIONAL SAFETY AND HEALTH REVIEW  
COMMISSION and PETER J. BRENNAN,  
SECRETARY OF LABOR,

Respondents.

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**BRIEF FOR PETITIONER,  
Olin Construction Company, Incorporated**

STATEMENT OF ISSUES PRESENTED:

1. Is reversible error committed where the findings of the Commission and its Administrative Judge, in favor of the Secretary, are based upon a standard of "substantial evidence" (instead of a "preponderance of the evidence") as the quantum of proof the Secretary must adduce to meet his burden of persuasion?
2. Were the findings of the Commission and its Administrative Judge, in favor of the Secretary, supported by "substantial evidence?"
3. Was the presence of employees in the trench in violation of the standards set forth at 29 C.F.R. 1926.652(b)?
4. Were the penalties imposed by the Commission proper and just?

### PRELIMINARY STATEMENT

The within proceeding is a petition (Ap. 1 - 4) by Olin Construction Co., Inc. (referred to herein as "Employer") to review a final order of the Occupational Safety and Health Review Commission (referred to herein as "Commission") issued in the matter entitled "Secretary of Labor, Complainant, vs. Olin Construction Co., Inc., Respondent, OSAHRC Docket No. 4459" pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (referred to herein as "the Act").

By order of this Court, dated February 6, 1975, Peter J. Brennan, Secretary of Labor (referred to herein as "Secretary") was made a party respondent in the within proceeding (Ap. 5).

The decision in the within matter, dated August 28, 1974, was rendered by David G. Oringer, Judge, OSAHRC. The decision is set forth in full in the appendix herein (Ap. 6 - 25). A summary of the decision is reported at 2 OSHC 3184 (Ap. 26, 27).

### STATEMENT OF CASE

On August 16, 1973, the Secretary, pursuant to Section 9(a) of the Act and as a result of an inspection made by representatives of the Secretary on August 9, 1973, issued to Employer a citation for an alleged repeated serious violation of the Act as set forth in the Standard at 29 C.F.R., Section 1926.652(b) with a proposed penalty of \$1,800.00 for said alleged repeated serious violation and a citation for an alleged repeated non-serious violation

of the Act as set forth in the Standard at 29 C.F.R., Section 1926.651(i)(1) with a proposed penalty of \$270.00 for said alleged repeated non-serious violation (Ap. 31-34).

On or about August 28, 1973, Employer filed timely notice of contest to both alleged violations and the proposed penalty of \$2,070.00 for both the alleged repeated serious and non-serious violations (Ap. 35 ).

Pursuant to the Act, the case was transferred to and received by the Commission on or about September 10, 1973 (Ap. 41 ).

On or about September 26, 1973, the Secretary filed a complaint with the Commission seeking affirmation of the citations and proposed penalties which Employer had contested (Ap. 36-43).

On or about October 1, 1973, Employer filed its answer to the complaint seeking dismissal of the alleged violations and the proposed penalties (Ap. 44-46).

By order dated November 21, 1973, the Commission granted the Secretary's motion (over opposition of Employer) to consolidate trial of the within cause with the matter entitled "Secretary of Labor, Complainant, vs. Olin Construction Co., Inc., OSAHRC Docket No. 4418" involving citations issued by the Secretary on August 7, 1973 as a result of inspection of another work site made August 3, 1973 (Ap. 8 ).

On January 23, 1974 and January 24, 1974, a hearing on the consolidated matters was held before David G. Oringer, Judge, OSAHRC, at Syracuse, New York (Ap. 10 ).

By decision and order dated August 28, 1974, Administrative Judge Oringer vacated the alleged violations and proposed penalties as set forth in consolidated cause OSAHRC Docket No. 4418 (Ap. 24 ). The determination of the Commission in this matter has become final and is not before the Court.

By the decision and order dated August 28, 1974, Administrative Judge Oringer determined as to the alleged violations set forth in OSAHRC Docket No. 4459 that Employer had been in violation of the Standard at 29 C.F.R. 1926.651(i)(1) in a non-repeated non-serious manner and, as modified, affirmed such violation by Employer and reduced the penalty therefor from \$270.00 to \$250.00 (paragraphs 4 and 5 of Order) (Ap. 25 ); and further determined Employer to have been in violation of the Standard at 29 C.F.R. 1926.652(b) in a serious, but not repeated, manner and, as modified, affirmed such violation and reduced the penalty therefor from \$1,800.00 to \$800.00 (paragraphs 6 and 7 of Order) (Ap. 25 ). Administrative Judge Oringer determined that the sum of \$1,050.00 was due from Employer to the Secretary (Paragraph 8 of Order) (Ap. 25).

On or about September 19, 1974, Employer pursuant to Rule 91 of the Rules of Procedure of the Commission petitioned the Commission for a review of the decision of Judge Oringer (Ap.28-30). Upon the failure of the Commission to grant Employer's petition for review of the decision and order of Judge Oringer, the order became a final order of the Commission on September 27, 1974. Employer duly brought the within petition for review before this Court.

### STATEMENT OF FACTS

1. Employer is a New York corporation with principal offices in Camillus, Onondaga County, New York, engaged in the construction business (Ap. 49)(Tr. 6).
2. In August, 1973, Employer was engaged in constructing a sanitary sewer line for the County of Onondaga, New York on Lake Shore Road, Brewerton, New York (Ap. 108)(Tr. 203).
3. On August 9, 1973, a work crew of Employer was excavating a trench for the installation of a lateral sanitary sewer line at a work site designated as 7087 Lake Shore Road, Brewerton, New York (Ap. 55, 134)(Tr. 43, 258).
4. On August 9, 1973, while driving along Lake Shore Road, representatives of the Secretary (Area Director Chester G. Whiteside and Enforcement Officer Harold Pauly) noticed an open trench at the above work site and stopped to make an inspection (Ap. 88, 89)(Tr. 113, 114).
5. The trench ran generally in a south to north direction from the roadway (Ap. 77)(Tr. 91).
6. The Secretary's representatives determined the trench to be 8 to 9 feet deep, 12 to 15 feet in length and 9 to 10 feet wide at the top (Ap. 60, 61, 62)(Tr. 48, 49, 50).
7. Enforcement officer Pauly entered the unshored portion of the trench to make measurements. (Ap. 58, 84, 96)(Tr. 46, 99, 150)(Ex. C-5, C-6) upon direction of Area Director Whiteside (Ap. 84, 97)(Tr. 99, 151).

8. No measurement of the bottom width of the trench was made (Ap. 94 )(Tr. 146).

9. The work crew had placed a ladder into the north end of the trench (Ap. 77, 83 )(Tr. 91, 97)(Ex. C-4, Ap. 157).

10. Enforcement officer Pauly did not see any employee in the trench (Ap. 63, 80 )(Tr. 51, 94).

11. As Area Director Whiteside approached the work site, he observed an employee on the ladder which had been placed into the north end of the trench (Ap. 89 )(Tr. 114). Whiteside did not know if the employee had been in the trench; or if he had, where he had been in the trench (Ap. 93) (Tr. 145). Whiteside did not observe any employee in the trench (Ap. 89) (Tr. 114).

12. At the time of the inspection, the work crew was in the process of installing shoring at the north end of the trench which had been completed except for the installation of the bottom brace (Ap. 104, 106, 135, 136, 139) (Tr. 199, 201, 259, 260, 263).

13. Shoring had not been installed in the south end of the trench (Ex. C-5, Ap. 159).

14. No employee had been in the unshored portion of the trench prior to the inspection (Ap. 138 )(Tr. 262).

15. Employees did not believe the south end of the trench to be unsafe even though it was unshored (Ap. 107, 139) (Tr. 202, 263).

16. Although present at the time of the inspection, the employee whom Whiteside saw on the ladder was not questioned as to where he was and what he was doing in the trench (Ap. 100) (Tr. 157).

17. The sides of the trench had an angle of repose of approximately 45 degrees (Ap. 105, 119, 143 )(Tr. 200, 222, 267).

POINT I. THE FINDINGS OF THE COMMISSION  
IN FAVOR OF THE SECRETARY ARE BASED  
UPON THE WRONG STANDARD OF PROOF.

The Administrative Judge in his decision (Dec. p. 5; Ap.10 ) states the standard of proof he required of the Secretary in making his determination of the issues involved in the within proceeding to be as follows:

"Having heard the testimony and observed the demeanor of the witnesses, and having considered the same, together with the citations, notifications of proposed penalties, notices of contest, pleadings, representations, stipulations and admissions of the parties, it is concluded that substantial evidence on the record, considered as a whole, supports the following" (Emphasis ours)

It is apparent that the Administrative Judge used the "substantial evidence" standard as the basis for making his determination in favor of the Secretary.

The Commission itself has rejected the "substantial evidence" standard as the appropriate burden of proof in Commission cases.

"The Judge's decision was rendered prior to the Commission decision in Secretary of Labor v. The Ceco Corporation, OSHRC Docket No. 326 (1 OSHC 1208) (April 27, 1973). Ceco established a substantial evidence standard as a measure of the quantum of proof Complainant must adduce to meet his burden of persuasion.xxxxx"

"In this regard, we note that the preponderance rule is the usual standard applied to the evidentiary record in agency proceedings (citing authorities).

The preponderance rule is appropriate for our proceedings, we hereby adopt it, and hereby overrule Ceco to the extent that it announces a different rule.xxx"

Secretary of Labor v. Armor Elevator Company, Inc., OSAHRC Docket Nos. 425 and 426, November 20, 1973, 1 OSHC 1409, 1410, 1411.

The United States Court of Appeals for the District of Columbia in discussing the issues in National Realty and Construction Company, Inc. vs. OSAHRC (1973), 489 F. 2d 1257, 1 OSHC 1422 determined the burden of proof required of the Secretary in proving a violation of the Act as follows at page 1263:

"Published regulations of the Commission impose on the Secretary the burden of proving a violation of the general duty clause. When the Secretary fails to produce evidence on all necessary elements of a violation, the record will - as a practical consequence - lack substantial evidence to support a Commission finding in the Secretary's favor. That is the story of this case. It may well be that National Realty failed to meet its general duty under the Act, but the Secretary neglected to present evidence demonstrating in what manner the company's conduct fell short of the statutory standard. Thus the burden of proof was not carried, and substantial evidence of a violation is absent."

In footnote 24 to the above paragraph, the Circuit Court further explains the burden of proof required of the Secretary:

"A reviewing court will typically be concerned only with the Secretary's production burden. The burden of proof presumably also includes the burden of persuading the Commission, or its hearing examiner, by a preponderance of the evidence, but a reviewing court must uphold a Commission finding supported by substantial evidence, and the Commission's view on the preponderance of the evidence is otherwise final."

Employer submits that both the Courts and the Commission have clearly determined that the proper standard of persuasion before the Commission is by a preponderance of the evidence; upon failure to meet such standard, the Secretary has failed to carry his burden of proof. Judicial review of the findings must determine that the findings are not supported by substantial evidence.

In view of the statement of the Administrative Judge (not disturbed by the Commission) that his determination in favor of the Secretary was based upon "substantial evidence on the record, considered as a whole (supra)" reversible error has been committed and the decision and order herein must be reversed.

POINT II. THE FINDING THAT EMPLOYER VIOLATED  
THE STANDARD AT 29 C.F.R. 1926.652(b)  
IS NOT SUPPORTED BY SUBSTANTIAL  
EVIDENCE ON THE RECORD CONSIDERED  
AS A WHOLE.

While Employer believes that the argument set forth in Point I herein shows sufficient error to reverse, Employer urges, without waiver of its Point I position, that in fact the determination in favor of the Secretary is not supported by substantial evidence.

The Standard at 29 C.F.R. 1926.652(b) provides that:

"Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section)."

A. THE EVIDENCE AS TO SLOPING OF TRENCH.

Finding of Fact 18 (Ap.14,15) by the Administrative Judge states:

"On August 9 the complainant inspected an open and unshored trench which was the work site of the respondent. The trench was 8 or 9 feet deep, 12 to 15 feet long, elliptical-shaped and 9 to 10 feet wide, of unstable soil made up of sand, silt and loam, which had insufficient bracing, and was without shoring, sheeting, or sufficient sloping or other means of support (tr. pp. 43-50, 113)."

As support for this finding, Administrative Judge refers to evidence appearing at pp. 43-50 and 113 of the transcript.

Pages 43-50 (Ap.55-62 ), refers to testimony of Enforcement Officer Pauly who identified Secretary's photographs Exs. 4, 5 and 6 (Ap. 157, 159, 161) (Tr. 43-47) and testified that the excavation had no angle of repose (Ap. 62) (Tr. 50). Pauly restated this position on cross-examination testifying that "the sides of the trench were at a 90 degree angle (Ap. 79 )(Tr. 93).

The Administrative Judge as support for the finding also cited page 113 of the transcript (Ap. 88 ). The testimony on this page of the direct testimony of Area Director Whiteside has no support for the finding as it refers to the August 3, 1973 alleged violation which had been consolidated for trial with the matter at bar and subsequently dismissed by the Administrative Judge.

On direct examination, Whiteside gave no testimony as to the slope of the sides of the trench. However, on cross-examination Whiteside testified that there was an angle of repose to the sides of the trench and that they were not straight down (Ap. 94 )(Tr. 146).

Whiteside's testimony that there was an angle of repose to the sides

of the trench is supported by the Secretary's photograph, Exhibit C-5, which shows a definite slope to the sides of the trench.

Employer submits that Pauly's testimony is completely negated by Whiteside's testimony and Exhibit C-5 (cf. Secretary of Labor vs. P. B. W. Construction Co., Inc., Docket No. 4776 - June 17, 1974, 2 OSHC 3055, in which the Administrative Judge relied on photographs to disprove the Secretary's contention).

No other testimony was introduced by the Secretary to support his burden that there was no sloping to the sides of the trench.

The testimony of Employer's witnesses that the sides had an angle of repose of approximately 45 degrees (Ap. 105, 119, 143) (Tr. 200, 222, 267) was completely ignored by the Administrative Judge although it is the only testimony as to the degree of repose to the sides which were obviously sloped.

Employer submits that the Secretary has failed to meet its burden of proof on this issue regardless of the standard used.

**B. THE EVIDENCE AS TO SHORING AND EMPLOYEE EXPOSURE.**

It must be admitted that shoring was being installed at the end of the trench where a ladder had been placed (Photograph Ex. C-4) (Ap. 158).

Secretary's witnesses admittedly did not see any employee in the trench (Ap. 63, 80, 89) (Tr. 51, 94, 114).

While the Administrative Judge found that Employer had allowed employees to work in the trench (Finding 19; Ap. 15 ), the Secretary did not produce any testimony to prove or disprove the fact that employees were in

the trench for reasons other than installing the protective shoring (Ap. 104, 106, 135, 136, 139) (Tr. 199, 201, 259, 260, 263) to bring the trench into compliance with safety standards.

The Commission has determined that:

"A violation of this Act is not established unless there is evidence that employees of respondent have been exposed to hazard as a result of non-compliance with the requirements of an occupational safety and health standard (citing cases). xxx

The burden of so establishing is part of the complainant's prima facie case (citing cases)"

Secretary of Labor v. Bechtel Corporation, 2 OSHC 1336, 1337.

The Commission has also held that the presence of an employee in a trench for the purpose of installing shoring is not a violation of the Standard at 29 C.F.R. 1926.652(b).

"On the basis of the facts established by the evidence, the employer cannot be held to have violated 29 CFR 1925.652(b). That standard provides that a trench in soft or unstable material be supported by one of several means, and the means chosen by the employer in this case was a shoring system. While an employee was in the trench before the shoring was completed, he was there precisely for the purpose of installing the shoring system. It is axiomatic that before a shoring system can protect employees it must first be installed and someone must install it."

Secretary of Labor v. Carson's Heating and Ventilating Company, Inc. OSAHRC Docket No. 2977, May 13, 1974, 2 OSHC 3021, 3022; Secretary of Labor v. W. R. Lesoing Mechanical Contractor, OSAHRC Docket No. 3979, April 4, 1974, 1 OSHC 3357.

Although Area Director Whiteside did talk to the employee and ascertain

that he had been in the trench, the employee was not asked what work he was doing. Whiteside did not believe it to be necessary (Ap. 100) (Tr. 157).

Employer submits that since the only evidence in the record shows that the employee's presence in the trench was not in violation of the standards of the Act, the finding of employee exposure is not supported by any evidence, substantial or otherwise. The Secretary having failed in his burden of proof on this issue, the serious violation should be reversed. (Secretary of Labor v. J. E. Roupp & Company, Inc., OSAHRC Docket Nos. 146 and 147, April 15, 1974, 1 OSHC 1680).

C. THE EVIDENCE AS TO THE TRENCH'S BEING UNSAFE.

Employer has contended that any claim by the Secretary that employees were allowed to work in an unsafe trench is completely negated by the fact that enforcement officer Pauly actually entered the trench (Photograph Exhibits C-5 and C-6) at the direction of Area Director Whiteside (Ap. 84, 97) (Tr. 99, 151).

The Administrative Judge during the course of the hearing stated (Ap. 74 ) (Tr. 76):

"Judge Oringer: I take it for granted that if a compliance officer deems the trench to be unsafe, he would not go into it to measure the bottom. Go ahead. I have already decided that in the case."

However, in his opinion, the Administrative Judge rejects this determination holding that the act of the enforcement officer may be the height of folly but not making the trench any less dangerous (Dec. p. 16; Ap. 21).

Employer, however, submits that the action of the enforcement officer, particularly on the specific instruction of the Area Director, suggests the more rational conclusion that an enforcement officer would not willingly go into an unsafe situation when it was not required for inspection purposes as no measurement of the bottom width of the trench was made when Pauly was in the trench (Ap. 94 ) (Tr. 146). It should be shown also that such action was specifically contrary to the inspection regulations published at 29 C.F.R. Sec. 1903.7(c) which provides that enforcement officers making an inspection shall comply with all employer safety and health rules and practices at the establishment being inspected.

The action of the enforcement officer supports the testimony of Employer's witnesses that the trench was in fact a safe trench (Ap. 138, 139) (Tr. 262, 263).

Employer urges that the finding that the trench was unsafe is not supported by substantial evidence.

POINT III. THE PENALTIES IMPOSED ARE IMPROPER  
AND UNJUST.

The Secretary had proposed a penalty at \$1800.00 for an alleged repeated serious violation of the standard at 29 C.F.R. 1926.652(b) and a penalty of \$270.00 for an alleged repeated non-serious violation of the standard at 29 C.F.R. 1926.651(i)(1) (Dec. p. 3; Ap. 7, 8).

Enforcement officer Pauly testified that these proposed penalties were arrived at by doubling the base figure for each alleged violation because they

were repeated violations less a 10% credit for history (Ap.69-71) (Tr. 57-59).

The penalties proposed by the Secretary for the alleged non-repeated violations of the same standards in the case consolidated with the case at bar were \$600.00 for the alleged serious violation and \$90.00 for the alleged non-serious violation. (Dec. p. 2; Ap. 7)

The Secretary did not propose any penalties for the alleged violations in the case at bar on the basis of their being non-repeated violations as ultimately determined by the Administrative Judge.

The Administrative Judge reduced the proposed repeated violation penalties to \$250.00 for the non-serious violation (Conclusion of Law 7; Ap. 23 ) and \$800.00 for the serious violation (Conclusion of Law 9; Ap.23,24).

Employer contends that if the Secretary were making proposed penalties for non-repeated violations in the case at bar, the proposed penalties would not have exceeded the amounts proposed in the consolidated case - \$600.00 for the serious violation and \$90.00 for the non-serious violation.

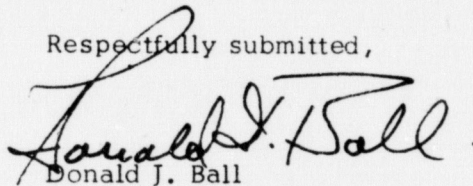
The Commission has in effect created a penalty when none had been proposed by the Secretary; or at least has increased the penalty which might have been proposed if the penalties were based on non-repeated violations. The Commission does not have authority to increase penalties proposed by Secretary or assess penalties when none are proposed (Dale M. Madden Construction Inc. v. Hodgson, Secretary of Labor, et al, C.C.A. 9, 502 F2d 278, 2 OSHC 1101; mod. 2 OSHC 1236).

POINT IV. CONCLUSION

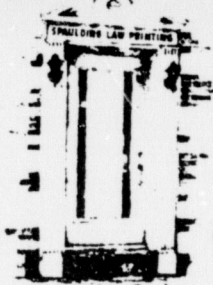
Employer respectfully requests that this Court grant the following relief:

1. An order setting aside and vacating the decision of the Commission determining that Employer was in violation of the Standard at 29 C.F.R. 1926.652(b); or in any event, any penalty therefor shall not exceed the sum of \$600.00; and
2. An order reducing the penalty for violation of the Standard at 29 C.F.R. 1926.651(i)(1) to an amount not exceeding the sum of \$90.00.
3. And for such other relief as this Court may deem just and meet.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Donald J. Ball", is written over the typed name.

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RE: OLIN CONSTRUCTION CO., INC. v. OCCUPATIONAL SAFETY AND  
HEALTH REVIEW COMMISSION and PETER J. BRENNAN, SECRETARY OF LABOR

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) ss.:  
CITY OF SYRACUSE )

EVERETT J. REA, being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse,  
New York, and is over twenty-one years of age.

That at the request of DONALD J. BALL, Attorney for Petitioner,

he personally served three (3) copies of the printed ~~Record~~ [Brief] and  
[Appendix] of the above-entitled case addressed to:

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day of May, 1975.

*Russ S. Moloughney*  
Commissioner of Deeds

cc: Donald J. Ball, Esq.